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In the

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF JOHN A. RAPANOS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the United States Army Corps of Engineers exceed the scope of federal jurisdiction under the Clean Water Act by penalizing a property owner for filling isolated wetlands that do not abut a body of open water but lie several miles from the nearest navigable waterway?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, John A. Rapanos and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

John A. Rapanos is the owner of a 175-acre tract in Williams Township, Bay County, Michigan, located west of Bay City on Interstate 95. In an effort to develop his property for commercial use, he set up a sawmill, cleared the "heavily wooded plot," removed the stumps, and filled some of the wetlands with sand. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002). Though his property lies approximately twenty miles from the nearest navigable waterway, the United States asserted jurisdiction over the property and Mr. Rapanos was prosecuted for discharging fill into "waters of the United States" without the appropriate permit. *See id.* Mr. Rapanos was tried and convicted, fined $185,000, and sentenced to three years probation. *See id.* at 1013. The conviction was upheld on appeal, but this Court granted a writ of certiorari, vacated the conviction, and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *See Rapanos v. United States*, 533 U.S. 913 (2001).

The district court found that federal jurisdiction was improper after *SWANCC*, *see United States v. Rapanos*, 190 F. Supp. 2d at 1017, but the Sixth Circuit reversed that determination and further directed the trial court to increase the

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

sentence to include a minimum of ten months in prison. *See United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). The Sixth Circuit based its decision in Mr. Rapanos's case on the same Fourth Circuit case that the court below relied on here: *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). *See Rapanos*, 339 F.3d at 452. The interpretation of the Clean Water Act adopted in both *Rapanos* and *Deaton* has been explicitly rejected by the Fifth Circuit's *In re Needham* decision. No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16, 2003). Mr. Rapanos has filed a petition for writ of certiorari with this Court and thus has a significant stake in the determination of this case. *See Rapanos v. United States*, Docket No. 03-929.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America, incorporated for the purpose of litigating in the public interest. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property and has advocated a balanced approach to environmental issues. PLF supports the concept of limited government, the appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with other needs of society.

PLF attorneys have participated before this Court on several occasions involving interpretations of the Clean Water Act (CWA). For example, PLF attorneys participated as amicus curiae in *SWANCC*, 531 U.S. 159, and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). PLF attorneys also represent John A. Rapanos on his petition before this Court which raises issues that are nearly identical to those in this case. And, PLF attorneys have offered nonpartisan testimony before Congress on the scope of federal jurisdiction under the Clean Water Act. *See Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal*

Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 12, 2002). PLF believes that its experience in this area will provide an additional, valuable, and informed viewpoint on the issues presented in this case.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be granted because the lower court's decision raises important questions of federal law. Specifically, the decision below misinterprets the Clean Water Act by upholding federal jurisdiction over nonnavigable, intrastate wetlands that do not abut a navigable waterway. The Fourth Circuit has effectively displaced local decisionmaking with federal land use planning. This decision grants federal officials a virtual veto power over land use for hundreds of millions of acres, thereby undermining local planning goals, state sovereignty, and the rights of property owners.

In addition, the three branches of government are in a state of confusion over the meaning of this Court's decision in *SWANCC* and the proper scope of federal jurisdiction under the Clean Water Act. Congress is holding hearings on the scope of *SWANCC* while the executive branch is unable to articulate a consistent statement on federal jurisdiction over wetlands. Most significantly, the lower federal courts openly and directly conflict with one another on the reach of the Clean Water Act. The Fifth Circuit, for example, recently expressly identified and rejected the Sixth Circuit's reasoning in *Rapanos*. *In re Needham*, 2003 WL 22953383, at *3. Thus, this Court should grant the Petition for Writ of Certiorari to resolve the controversy and confusion over the scope of federal jurisdiction under the Clean Water Act.

STATEMENT OF THE CASE

Newdunn Associates, L.L.P., and its agents, Orion Associates and Northwest Contractors Corporation, began various development activities on Newdunn's private property in June, 2001. *United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 753 (E.D. Va. 2002). After some logging, excavation, and filling had been completed, the Army Corps of Engineers and the State of Virginia brought enforcement actions against Newdunn, both primarily complaining that Newdunn had failed to secure a federal permit before filling the wetlands. *See id.* at 754.

The Army Corps' jurisdiction was based solely on the presence of a surface hydrologic connection to navigable waters, *see id.* at 756, and the government does not dispute that the wetlands at issue in this case do not abut a navigable waterway. Rather, the district court found that "[r]ain generated runoff . . . occasionally exit[ed] the Property through a spur ditch" and into another set of nonadjacent wetlands. *Id.* at 757-58. From those wetlands, water occasionally flowed through a seasonal, manmade ditch which eventually ran into a culvert under Interstate 64 and into another manmade ditch. *See id.* at 758. Water "intermittently" flowed through that ditch for over one mile before entering the nonnavigable arm of the Western Stony Run. *Id.* The water then ran, again "intermittently," some distance downstream to a point where Stony Run becomes a navigable water. *Id.*

The District Court found that this "far exceeded the grant of authority by Congress in the CWA," *id.* at 765, and that there were "no definable limits to the Corps' definition of tributaries over which it possesses jurisdiction." *Id.* at 766. The trial court thus entered judgment for Newdunn because the Corps did not "have jurisdiction over the wetlands on the Newdunn Property." *Id.* at 771.

The Fourth Circuit Court of Appeals, however, reversed this ruling, finding that the intermittent surface hydrologic connection provided "a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact" to support federal jurisdiction under the Clean Water Act. *See Treacy v. Newdunn Associates LLP*, 344 F.3d 407, 417 (4th Cir. 2003). The Court rejected the federal jurisdictional argument in Footnote 5, finding that "Newdunn's insistence that *SWANCC* limited the Corps' jurisdiction solely to those wetlands adjacent to navigable waters-in-fact [wa]s *plainly incorrect*." *Id.* at 415 n.5 (emphasis added).

ARGUMENT

I

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW BECAUSE IT INJECTS FEDERAL OVERSIGHT INTO AN AREA OF TRADITIONAL STATE CONTROL AND DISPLACES STATE AUTHORITY OVER LAND USE PLANNING

A. The Decision Below Interprets the Clean Water Act to Extend Federal Jurisdiction Deep into an Area of Traditional State Concern

It is undisputed that land use planning is an area traditionally reserved to state and local governments. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water. . . ."); J. Blanding Holman, IV, *Note: After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 140 (1995) (noting that the CWA involves the government in "land use regulation, an area traditionally of

local concern"). Indeed, land use is widely recognized as "perhaps the quintessential local responsibility." Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 Wm. & Mary L. Rev. 1191, 1205 (2001).

State and local planners must balance a wide variety of objectives when evaluating land use decisions in order to fulfill their general goal of "enhanc[ing] the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping, and recreational activities." West's Fla. Stat. Ann. § 187.201(15)(b)(3). The state must account for myriad "social, political and legal obstacles confronting the intent of private landowners, state governments, and federal regulatory agencies" in the land-use process. Eric M. Bryn, *Through a BioDiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management Plan*, 1 Great Plains Nat. Resources J. 65, 81 (1996). Amicus John Rapanos's state of Michigan has identified more than twenty objectives for land use planning. *See Michigan's Land, Michigan's Future*, http://www.michiganlanduse.org /finalbysection.htm (Dec. 23, 2003). The bipartisan Michigan Land Use Leadership Council, formed by Governor Granholm, seeks to balance such diverse goals as "vibrant 'hip' cities," protection of scenic vistas, a healthy environment and healthy economy, energy efficiency, private property rights, expanded housing choices, "a 'Michigan solution'" to local land use issues, and effective local, multijurisdictional, and state planning. *See id.* at 22-23. Similar planning goals exist in Newdunn's state of Virginia. *See Fairfax County Comprehensive Plan*, 2003 Edition at 1, http://www.fairfaxcounty.gov/gov/ocp/comprehensiveplan/ policyplan/preface.pdf (outlining such goals as quality of life, transportation, energy conservation, and economic development). Through local control, communities may develop "broad goals at the state level," which "shaped locally,

can result in a workable legal regime" balancing societal needs with sustainable development. David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2366 n.457 (2003).

Displacing state authority with a burdensome federal regulatory scheme under the Clean Water Act distorts this process. It removes the state's ability to balance these complex goals and replaces it with a powerful, single-minded federal statute. Expanding federal jurisdiction over this delicately crafted system supplants the state's multi-factor planning and replaces it with a single, overriding federal purpose driven by the force of severe penalties. Amicus John Rapanos is facing 10-16 months *in a federal penitentiary* for filling wetlands on his private property with sand, a practice which was, for many years, encouraged as good public policy. *See* James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1, 37 (2002). If Newdunn's case is remanded to the lower court as ordered by the Fourth Circuit, he will face similar penalties for engaging in this routine practice. Further, Mr. Rapanos was tried solely for depositing sand in the wetlands without a federal permit, not from any resulting environmental damage or impairment of navigable waters. *See United States v. Rapanos*, 190 F. Supp. 2d at 1012. Indeed, Mr. Rapanos's wetlands are some 20 miles from the nearest navigable waterway and the only basis for federal jurisdiction is, as here, a remote surface hydrologic connection. *See id.* at 1014. Like Mr. Rapanos's wetlands, the *Newdunn* property is only hydrologically connected to a distant navigable water by a series of intermittent ditches, culverts, and streams, the majority of which are man-made.

The *Newdunn* and *Rapanos* situations are unfortunately not rare exceptions to Corps enforcement but the rule. Most famously, elderly Florida resident Ocie Mills and his son were "sent to prison for depositing sand on his privately-owned wetlands that the public had decided it wanted but was unwilling to purchase." Roger Marzulla, et al., *Taking*

"Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress, 9 Admin. L.J. Am. U. 253, 260 (1995). They each received 21 months in jail, one year of supervised release, and were fined. *See United States v. Mills*, 36 F.3d 1052, 1055 (11th Cir. 1994).

In another well-publicized case, John Pozsgai was sentenced to three years imprisonment, five years probation, and fined $200,000 for placing clean fill in wetlands in Eastern Pennsylvania. *See United States v. Pozsgai*, 757 F. Supp. 21, 22 (E.D. Pa. 1991). Members of Congress described the Corps' behavior towards Mr. Pozsgai as "dictatorial" and "Gestapo-like." Bud Shuster & Jimmy Hayes, *Big Lie on Clean Water*, Wash. Post, May 16, 1995, at A17. There are others. *See, e.g., United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (noting that Wilson was sentenced to 21 months in prison and $1 million in fines for filling nonadjacent wetlands that drained to ditches, intermittent streams, and creeks). But equally significant, the very real threat of imprisonment deters landowners from making full use of their property and coerces them to accept federal intrusions. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envtl. L.J. 43, 64 (1993) (describing the well-known deterrent effect of jail time for environmental "crimes" on otherwise law-abiding citizens).

Expanding federal jurisdiction into this traditional state area does not simply result in inconvenience or disruption in the local land use process planning but rather subjugates a state's numerous goals to one overriding federal objective backed up by draconian penalties. There are currently three petitions for writ of certiorari pending before this Court questioning the scope of federal jurisdiction under the Clean Water Act: This case, *Deaton v. United States* (Docket No. 03-701), and *Rapanos v. United States* (Docket No. 03-929). This important question of law requires resolution from this Court.

B. The Decision Below Extends Federal Jurisdiction over Hundreds of Millions of Acres of Land and Imposes Harsh Burdens on Property Owners

Interpreting the phrase "waters of the United States" in the Clean Water Act to include any water with a hydrologic connection to a navigable water greatly expands federal jurisdiction and displaces state authority in one of its primary areas of responsibility. While it is unclear just how many millions of acres of wetlands exist in the United States, the number is enormous. By some estimates, there are as many as three hundred million acres of wetlands over which the Corps exercises jurisdiction. *See* Christopher J. Schulte, *Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?,"* 15 Hamline L. Rev. 439, 444 (1992) (explaining that, under the Federal Wetlands Manual operational before *SWANCC*, "the jurisdictional reach of the federal government has been estimated to have increased from the previous 105 million acres to between 200 and 300 million acres"). In Minnesota, *20%* of the state is made up of wetlands. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation*: *A Post* SWANCC *Exploration of Conservation Alternatives* at 11 (Jan. 2003), http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF (hereinafter *The Sunding Permitting Study*). Alaska has an estimated 170 million acres of wetlands while Florida, Louisiana, Texas, North Carolina, Michigan, Wisconsin, and Maine contain over 5 million acres of wetlands each. *See* Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 Va. Envtl. L.J. 1, 19 n.99 (2000).

This extension of federal jurisdiction over such a vast expanse of land is startling given that "[l]and use control is the most important local regulatory power." Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 3 (1990). Under the lower court's reasoning,

states surrender their traditional primary control over land use and, instead, must send their citizens to seek centralized, federal approval for local projects.

States will not be alone in suffering harm if the lower court's decision is not reviewed. Individual property owners, already forced to run the hazardous gambit of the local land use planning process, will have to further endure an expensive and burdensome federal review process. *The Sunding Permitting Study* concludes that it takes an average of 788 days—two years and two months—to receive a section 404(a) permit. *See The Sunding Permitting Study*, *infra* p. 9, at 8. The lengthiest permit took 1,884 days to grant, an astonishing 5 years and 2 months, *see id.* at 8 n.16, while the mean individual cost for a section 404(a) permit was $271,596. *See id.* at 7. Moreover, these figures are extremely understated because they cover only the costs for labor in putting together the permit and do not account for mitigation conditions attached to the permits, the effect on the local economy, or delay and costs associated with the oft-required redesign of the project. *See id.*

The burdensome costs of individual permit applications are particularly important given the $760 billion that construction and development activity contribute to the economy on an annual basis. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 81 (2002). The sale price of property with federally regulated wetlands is devalued by over 10% due solely to the burdens of dealing with the federal regulatory process. *See* Randall S. Guttery, et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 Am. Bus. L.J. 299, 329 (2000). Significantly, this devaluation of land is also present when a property is even *likely* to be delineated as a federally protected wetland. *See id.* at 316. Not surprisingly, these development costs are passed

on, though to an unknown extent, to individual home buyers. *See id.* at 316 & n.83.

Thus, this case presents an important question regarding the scope of federal jurisdiction over wetlands under the Clean Water Act. Because the decision below permits the federal government to intrude into the state's primary control over land use planning and has such severe impacts on both the economy and property owners, the Court should grant the Petition for Writ of Certiorari and clarify the scope of federal jurisdiction under the Clean Water Act.

II

THE DECISION BELOW HIGHLIGHTS THE CONFLICT AND CONFUSION IN BOTH THE LOWER COURTS AND ADMINISTRATIVE AGENCIES OVER THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT

A. The Lower Courts Are in Direct and Express Conflict over the Scope of Federal Jurisdiction Under the Clean Water Act

In the fewer than three years since this Court decided *SWANCC*, dozens of courts have been called upon to determine the scope of federal jurisdiction under the Clean Water Act. *See* Lawrence R. Liebesman, *Judicial, Administrative, and Congressional Responses to* SWANCC, 33 Envtl. L. Rep. 10899 (2003) (surveying the post-*SWANCC* decisions in the district courts and Courts of Appeals). *See also United States v. Rapanos*, 339 F.3d 447, *petition for writ of certiorari pending*, *United States v. Deaton*, 332 F.3d 698, *petition for writ of certiorari pending*, *United States v. Rueth Development Co.*, 335 F.3d 598 (7th Cir. 2003), *Headwaters, Inc. v. Talent*, 243 F.3d 526 (9th Cir. 2003), *FD & P Enterprises, Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, (D.N.J. 2003), *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001), *Rice v. Harken Exploration Co.*, 250 F.3d 264

(5th Cir. 2001). The decisions have failed to craft a consistent standard and "[t]he split in interpretation among the courts wrestling with the *SWANCC* decision is deep and was instantaneous." Liebesman, 33 Envtl. L. Rep. at 10899.

Specifically, the decision below is in agreement with the Fourth Circuit's decision in *United States v. Deaton* and the Sixth Circuit's decision in *United States v. Rapanos*, both currently on petition for writ of certiorari before this Court, and in direct conflict with the Fifth Circuit's decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264, and *In re Needham*, 2003 WL 22953383. *Harken* determined that the scope of federal jurisdiction under the Oil Pollution Act was concurrent with jurisdiction under the Clean Water Act. 250 F.3d. at 267. There, Harken Exploration Company discharged various pollutants into a nonnavigable creek that flowed into a navigable river. *Id.* at 265. The plaintiffs brought suit under the Oil Pollution Act to compel Rice to pay the alleged $38 million dollar cleanup costs. In upholding the district court's dismissal, the Fifth Circuit concluded that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269. This interpretation of the Clean Water Act is in direct opposition to that offered by the court below and by the Sixth Circuit in *Rapanos*.

In re Needham even more explicitly rejects the reasoning of other circuit courts of appeals. 2003 WL 22953383, at *4. In another Oil Pollution Act case, the Fifth Circuit re-affirmed that the scope of federal jurisdiction under that Act and CWA were "co-extensive" and then proceeded to determine whether the waters at issue were "waters of the United States." *Id.* at *2. In setting forth the standard for jurisdiction under the Clean Water Act, the *In re Needham* court expressly rejected the rationale expressed in *Rapanos* and *Deaton*, and adopted by the lower court in this case. *See id.* at *3. The court noted that the

definition pressed by the Army Corps and approved by the Fourth and Sixth Circuit Courts of Appeals

> includes as "navigable waters" all "tributaries" of navigable-in-fact waters. *See id.* at § 300.5(d). According to the government, the definition covers all waters, excluding groundwater, that have any hydrological connection with "navigable water."

Id. at *3.

"In our view," the *In re Needham* court declared, the *Rapanos/Deaton* definition of waters of the United States "is unsustainable under *SWANCC*." *Id.* The Fifth Circuit was careful to note that "the regulatory definition, if applied in this fashion, would push the Oil Pollution Act to the outer limits of the Commerce Clause and raise serious constitutional questions." *Id.* at *5 n.8.

The court below in this case, however, casually dismissed these constitutional concerns *in a footnote* as "plainly incorrect" and upheld the government's broad assertion of authority. *Newdunn*, 344 F.3d at 415 n.5. Thus, the circuit courts of appeals are in direct and unavoidable conflict over the permissible scope of federal jurisdiction after the *SWANCC* decision.

B. Congress, Administrative Agencies, and the Executive Branch Officials Are Baffled as to the Proper Scope of Federal Jurisdiction After *SWANCC*

The confusion over the post-*SWANCC* scope of federal jurisdiction under the Clean Water Act is not limited to the lower federal courts. Federal administrative agencies, Congress, and the Department of Justice have all offered conflicting and confusing interpretations of the new scope of jurisdiction. In response to *SWANCC*, the Army Corps and the Environmental Protection Agency issued an "Advance Notice

of Proposed Rulemaking" to clarify the scope of federal jurisdiction under the Act. 68 Fed. Reg. 1991 (Jan. 15, 2003). In that document, the EPA and the Corps ask the public for comment on the meaning of the *SWANCC* decision but concede that they "are now precluded from asserting CWA jurisdiction in such situations including waters such as isolated non-navigable, intrastate vernal pools, playa lakes, and pocosins." *Id.* at 1996. They recognized that *SWANCC* "also calls into question whether CWA jurisdiction over isolated intrastate, non-navigable waters could now be predicated on the other factors" found in federal regulations like "use of water as habitat for birds protected by Migratory Bird Treaties; use of water as habitat by Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce." *Id.*

In November, the *Los Angeles Times* published a "leaked" copy of draft language for the future regulation removing federal control over "ephemeral" or seasonal wetlands and restricting jurisdiction to waters with a surface hydrologic connection to navigable waters. *See* Bob Marshall, *USFWS Contradicts Administration's Plans*, Times-Picayune, Dec. 7, 2003, at 16, 2003 WL 60081434 (noting that a draft copy of the regulations were "leaked to the Sierra Club"). After several weeks of public debate and criticism, though, the administration decided that it would not even issue *proposed* regulations. *See White House Backs Off on Wetlands Issue*, Wall St. J., Dec. 17, 2003, at B6, 2003 WL-WSJ 68131243 ("Bowing to criticism from Congress and the public, the Bush administration is backing away from a proposal that would have weakened federal jurisdiction over some U.S. wetlands."). Thus, it seems, the Administration requires further guidance from this Court on the proper scope of federal jurisdiction.

Congress has also held hearings on the impact of the *SWANCC* decision. *See Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on*

Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (stating that "the Supreme Court unambiguously limited the authority of the EPA and the Corps, under section 404(a) of the Clean Water Act, to waters that are traditionally navigable or to those waters (including wetlands) that are adjacent to traditionally navigable waters"). During the hearing, experts offered a variety of opinions but the committee reached no conclusions or solutions. The Department of Justice has also participated in congressional hearings on the topic of "Federal Jurisdiction of Navigable Waters Under Clean Waters," and has expressed concern over the lack of certainty in this area. *See Statement of Thomas L. Sansonetti, Assistant Attorney General for Environment and Natural Resources, Department of Justice, Subcommittee on Fisheries, Wildlife and Water, Committee on Senate Environment and Public Works*, 2003 WL 21350389 (June 23, 2003). Mr. Sansonetti noted that "the post-*SWANCC* case law remains unsettled as we are involved in at least nine *SWANCC*-related cases in the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits." *Id.*

Thus, there is a direct and significant conflict in the lower federal courts, and no agreement among federal administrative agencies, Congress, and the Department of Justice about the scope of federal jurisdiction under the Clean Water Act. At present, therefore, both landowners and administrators are forced to rely on a patchwork of conflicting circuit court decisions which produces varying, inconsistent results.

CONCLUSION

The court below has sanctioned a substantial and dangerous infliction of federal power on the local planning process. Given the conflict among the lower courts and the confusion among the political branches, it is up to this Court to untangle the disorder surrounding the appropriate scope of federal jurisdiction under the Clean Water Act. Thus, this Court should grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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